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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL LATELLA,

Petitioner,

vs.

NORWOOD JACKSON, Warden, Westchester County Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEST AVAILABLE COPY

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DANIEL LATELLA,

Petitioner,

v.

NORWOOD JACKSON, Warden, Westchester County Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court should grant this petition to resolve the conflict in the Circuits concerning the procedure necessary to preserve appellate rights in a proceeding commenced pursuant to 28 U.S.C. §2254 and whether a district court's denial of a certificate of probable cause in such a proceeding is a final and appealable order.

2. Whether the Second Circuit's disposition of this appeal is inconsistent with the Court's determination in Garrison v. Patterson, 391 U.S. 464 (1968).

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TO THE HONORABLE, THE CHIEF
JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF
THE UNITED STATES SUPREME COURT

Petitioner, Daniel Latella, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit that dismissed as untimely petitioner Latella's appeal from a judgment of the United States District Court for the Southern District of New York denying his application for a petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the second Circuit dismissing petitioner Latella's appeal was filed on April 27, 1987 and is officially reported at 817 F. 2d 12 (2d Cir. 1987). A copy of the opinion is annexed as Appendix A.

The memorandum opinion and order of the District Court (Duffy, J.) -- rendered on May 29, 1986 -- denying Mr. Latella's petition for a writ of habeas corpus, is not officially reported. A copy of this opinion is annexed as Appendix B. Included in Appendix B is the following: (1) the judgment of the District Court rendered on June 4, 1986 which denied the writ; (2) the District Court's June 24, 1986 denial of petitioner's motion for reargument; and (3) the District Court's August 12, 1986 order denying a certificate of probable cause.

JURISDICTION

The opinion of the Court of Appeals was dated and filed on April 27, 1987 (See Appendix A). A timely petition for rehearing containing a suggestion that the matter be reheard in banc was denied by the Court of Appeals in an order dated and filed

August 11, 1987. That order is annexed as Appendix C.

No application has been filed for an extension of time in which to file this petition.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On October 3, 1985, petitioner Latella filed in the District Court for the Southern District of New York a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The petitioner claimed that the grant of the writ was mandated on the following grounds: (1) the petitioner was denied a full and fair hearing by New York State and due process of law as a result of (a) the prosecution's alleged use of police perjury at a suppression hearing and (b) the New York State Appellate Division's

ruling that New York's newly discovered evidence statute (New York Criminal Procedure Law, §440.10(1)(g)) precluded collateral relief concerning the issue of police perjury at a suppression hearing because the petitioner subsequently entered a guilty plea to the underlying charges, and (2) the petitioner was denied due process and equal protection of the law by reason of his being sentenced in the New York State court as a second felony offender based upon a prior federal conviction which did not constitute a predicate felony under New York's own law, thereby resulting in the imposition of an improper and harsher sentence.

On May 29, 1986, the District Court (The Honorable Kevin T. Duffy) filed an opinion denying the petition. The judgment rendered in connection with the opinion was

entered on June 4th. On June 9, 1986, Mr. Latella filed a motion pursuant to Fed. R. Civ. P. 59(e) for reconsideration of the decision. Prior to the determination of the motion to reargue, on June 18, 1986, Mr. Latella moved pursuant to 28 U.S.C. §2253 for a certificate of probable cause. The motion for reconsideration was denied by an order filed June 25, 1986.

Petitioner Latella withheld filing a notice of appeal at that time[1] in the belief that such a filing would have no effect since it would have occurred prior to the disposition of his then still pending motion for a certificate of probable cause. Thereafter, in an order filed on August 12, 1986, the District Court denied the petitioner's motion for such a certificate.

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1. The petitioner's present counsel did not represent the petitioner in the district court.

Twenty-four days later, on September 5, 1986, petitioner Latella filed a notice of appeal in his case.[2] In pertinent part, the notice states:

> that DANIEL LATELLA appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on August 12, 1986, denying petitioner DANIEL LATELLA'S motion made pursuant to Title 28, United States Code, Section 2253 (1982) for a certificate of probable cause, following the denial of habeas corpus relief by Order dated May 27, 1986 and reargument by order dated July 24, 1986. [sic. should read Order dated June 24, 1986].

In a motion dated September 9, 1986, petitioner Latella requested that the Court of Appeals grant a certificate of probable cause. The State opposed the motion, contending that the Court of Appeals did not have jurisdiction of the matter because

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2. A copy of the notice of appeal is annexed as Appendix D.

the petitioner had not filed a timely notice of appeal, i.e., a notice of appeal filed within 30 days of the denial of his application for a writ of habeas corpus. In an order filed January 15, 1987, a copy of which is annexed as Appendix E, the Court of Appeals granted a certificate of probable cause, and the case was briefed on its merits.[3]

Nevertheless, on April 27, 1987, the Court of Appeals dismissed petitioner's appeal on the ground that it did not have appellate jurisdiction because the petitioner's notice of appeal had been filed outside of the 30-day limit mandated by Fed. R. App. P. 4(a)(1). The Court of Appeals explained:

---

3. In its brief on the merits, the State again raised the jurisdictional argument previously presented in its opposition to the motion for a certificate of probable

> In the instant case, the time period for the notice of appeal began to run upon the entry of the judgment on June 4 denying appellant's petition for a writ of habeas corpus. This period was then tolled when appellant made a timely motion for reconsideration pursuant to Rule 59(e). The order denying this motion was filed June 25. Since no subsequent application pursuant to the rules enumerated in Rule 4(a)(4) was made, the thirty day period in which appellant could file his notice of appeal began to run on June 26. Fed. R. App. P. 26(a). Appellant's notice of appeal was filed September 5 -- seventy-one days thereafter.
> (Appendix A)

Moreover, the Court of Appeals specifically declined to measure the 30-day period from the District Court's August 12, 1986 order which denied the petitioner's application for a certificate of probable cause.

REASONS FOR GRANTING THE WRIT

(CONT.)cause.

I

THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE PROCEDURE NECESSARY TO PRESERVE APPELLATE RIGHTS IN A PROCEEDING COMMENCED PURSUANT TO 28 U.S.C. §2254 AND WHETHER A DISTRICT COURT'S DENIAL OF A CERTIFICATE OF PROBABLE CAUSE IN SUCH A PROCEEDING IS A FINAL AND APPEALABLE ORDER

28 U.S.C. §2253 bars an appeal in a habeas corpus proceeding unless a certificate of probable cause is issued. That section states in pertinent part:

> [a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding...unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.(emphasis added).

See, Sagaser v. Sigler, 374 F. 2d 509 (8th Cir. 1967).

Similarly, Rule 22 of the Federal Rules of Appellate Procedure requires such a certificate in order to "proceed" with the appeal. On the other hand, Fed. R. App. P. 4(a)(1) makes clear that a notice of appeal must be filed within thirty days after the entry of the judgment or order appealed from unless the time is tolled pursuant to rule 4(a)(4).

These divergent mandates have generated in the Courts of Appeals conflicting requirements concerning the procedures necessary to preserve the right to appeal from the denial of an application for a writ of habeas corpus. The Third and the Ninth Circuits have treated an application for a certificate of probable cause as a notice of appeal for purposes of measuring the thirty-day requirement. Fitzsimmons v. Yeager, 391 F. 2d 849, 855

(3rd Cir.) (in banc), cert. denied, 393 U.S. 868 (1968) ("the application for a certificate of probable cause...was effective as a notice of appeal filed within thirty days of the denial of the petition for habeas corpus."); Poe v. Gladden, 287 F. 2d 249, 256 (9th Cir. 1961). But see, Kapsabs v. Wilson, 380 F. 2d 365, 366 (9th Cir.), cert. denied, 389 U.S. 878 (1967). The Fifth Circuit deems the denial of a certificate of probable cause a final and appealable order in a habeas corpus proceeding:

> A district court's denial of a certificate of probable cause is a final and appealable order. Such an order concludes the case: a party denied the certificate cannot appeal the district court's denial of the writ of habeas corpus, although he may seek a certificate from the court of appeals.

Flores v. Porcunier, 745 F. 2d 338 (5th Cir. 1984).

Thus, this decision means that absent a certificate of probable cause, an aggrieved party "cannot appeal," i.e., file a notice of appeal. Indeed, the Flores court equated the denial of a certificate of probable cause with a judgment and a motion in the district court to reconsider such a denial "a motion to alter or amend the judgment," Rule 59(e), Fed. R. Civ. Proc., which, if made within ten days of the district court's judgment, would toll the period within which to file a notice of appeal.

On the other hand, the Seventh and Eighth Circuits appear to require the grant of a certificate of probable cause before an appeal (i.e., a notice of appeal) may be filed. See, United States ex. rel. Geach v. Ragen, 231 F. 2d 455 (7th Cir. 1956); Sagaser v. Sigler, supra. See also, Fitzsimmons v. Yeager, supra, 391 F. 2d at

853 n. 15. Of course, here, the Court of Appeals did not treat the petitioner's district court application for a certificate of probable cause as a notice of appeal nor did it find that the District Court's denial of such a certificate was an appealable order. Accordingly, the Second Circuit's decision conflicts with determinations of the Third (Fitzsimmons v. Yeager, supra), Fifth (Flores v. Procunier, supra) and Ninth (Poe v. Gladden, supra) Circuits and may also be inconsistent with decisions in the Seventh (United States ex. rel Geach v. Ragen, supra) and Eighth (Sagaser v. Sigler, supra) Circuits.

It is clear that in not filing a notice of appeal pending the determination of his motion for a certificate of probable casue, the petitioner relied on the reasoning of the Fifth Circuit's decision in Flores v.

Procunier, supra. This is made explicit by petitioner's notice of appeal which assumes, as the Flores court held in that case, that a district court's order denying a certificate of probable cause was a final and appealable order. ("DANIEL LATELLA appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on August 12, 1986...") However, the Second Circuit's determination here obviously rejected this reasoning and is inconsistent with that case.

The issue presented here is significant to counsel representing State prisoners in habeas corpus proceedings, as well as to State prisoners litigating such matters pro se. The procedural steps necessary to preserve a State prisoner's right of appeal from the denial of a petition

for a writ of habeas corpus are unclear, generating divergent views and requirements in the Courts of Appeals and as a result, unfairness to litigants. To resolve these conflicts, the Court should grant this petition for certiorari.

II

THE SECOND CIRCUIT'S DISPOSITION OF THIS APPEAL IS INCONSISTENT WITH THE COURT'S DETERMINATION IN GARRISON v. PATTERSON, 391 U.S. 464 (1968).

In Garrison v. Patterson, 391 U.S. 464 (1968), the District Court denied a writ of habeas corpus, as well as a certificate of probable cause, in an order filed on June 5, 1967. The petitioner there never filed a notice of appeal. Rather,

> Three days later, on June 8, petitioner's attorneys filed with the Court of Appeals for the Tenth Circuit a three-page document requesting a further stay of execution , a

> certificate of probable case to appeal, and leave to appeal in forma pauperis. This document merely stated the formal history of the case in numbered paragraphs, noted one of the issues, and alleged that "this petition merits further hearing by this Court."

Garrison v. Patterson, supra, 391 U.S. at 465.

The next day, counsel "were heard orally by a panel of the Court of Appeals. The hearing was not recorded." Garrison v. Patterson, supra, 391 U.S. at 465. On June 18, the Court of Appeals granted the certificate of probable cause but affirmed the denial of the writ. The Court granted the petitioner's petition for a writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case for a determination of the merits of the petitioner's claims. The Court explained:

> We hold only that where an appeal possesses sufficient merit to warrant a certificate [of probable cause], the appellant must be afforded adequate opportunity to address the merits...

Garrison v. Patterson, supra, 391 U.S. at 466.

The Court of Appeals' ruling here is inconsistent with the Court's rationale in Garrison. Having granted a certificate of probable cause, the Court of Appeals should have resolved the case on its merits. Because it did not do so, the Court should vacate the order of the Court of Appeals and remand the case for such a determination. See, Garrison v. Patterson, supra.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 989—August Term, 1986

(Argued: March 26, 1987 Decided: April 27, 1987)

Docket No. 86-2308

DANIEL LATELLA,

Appellant,

— v. —

NORWOOD JACKSON, Warden, Westchester County Department of Corrections,

Appellee.

Before:

KAUFMAN, TIMBERS and PIERCE,

Circuit Judges.

Tardy appeal from a judgment entered in the Southern District of New York, Kevin T. Duffy, *District Judge.*

denying a state prisoner's petition for a writ of habeas corpus.

Appeal dismissed for lack of appellate jurisdiction.

Francis J. Murray, New York, N.Y. (Murray, Skoff & Kelleher, New York, N.Y., on the brief), *for appellant.*

Richard E. Weill, Assistant District Attorney of Westchester County, White Plains, N.Y. (Carl A. Vergari, District Attorney, and Anthony J. Servino, Second Deputy District Attorney, White Plains, N.Y., on the brief), *for appellee.*

PER CURIAM:

Daniel Latella ("appellant") appeals from a judgment entered June 4, 1986 in the Southern District of New York, Kevin T. Duffy, *District Judge,* denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). Appellant filed a tardy notice of appeal on September 5, 1986. We dismiss the appeal since we lack appellate jurisdiction.

Appellant is a New York state prisoner. On October 3, 1985 he filed a petition for a writ of habeas corpus in the Southern District of New York. On May 29, 1986 Judge Duffy filed an opinion denying the petition. A judgment was entered on Judge Duffy's opinion on June 4. On June 9 appellant filed a motion pursuant to Fed. R. Civ. P. 59

to reconsider its decision. On June 18 appellant filed a motion pursuant to 28 U.S.C. § 2253 (1982) for a certificate of probable cause. The motion for reconsideration was denied in an order filed June 25. The application for a certificate of probable cause was denied in an order filed August 12. A notice of appeal was filed September 5.

Under Fed. R. App. P. 4(a)(1) a notice of appeal must be filed within thirty days after the entry of the judgment or order appealed from. The exceptions to this rule, which toll a litigant's time for filing a notice of appeal, are enumerated in Rule 4(a)(4), and are strictly construed. *Griggs* v. *Provident Consumer Discount Company*, 459 U.S. 56 (1982). Under Rule 4(a)(4), in the event a timely application is made pursuant to Fed. R. Civ. P. 50(b), 52(b) or 59, the time for appeal shall run from the entry of the order denying the relief sought. The logic behind the exceptions to the time requirements of Rule 4(a)(1) is clear; each has the potential for rendering an appeal unnecessary or academic.

In the instant case, the time period for the notice of appeal began to run upon the entry of the judgment on June 4 denying appellant's petition for a writ of habeas corpus. This period was then tolled when appellant made a timely motion for reconsideration pursuant to Rule 59(e). The order denying this motion was filed June 25. Since no subsequent application pursuant to the rules enumerated in Rule 4(a)(4) was made, the thirty day period in which appellant could file his notice of appeal began to run on June 26. Fed. R. App. P. 26(a). Appellant's notice of appeal was filed September 5—seventy-one days thereafter. It is clear that we do not have jurisdiction to review the judgment denying appellant's petition for a writ of habeas corpus. "It is well settled that the

requirement of a timely notice of appeal is ' "mandatory and jurisdictional." ' " *Griggs, supra,* 459 U.S. at 61 (quoting *Browder* v. *Director, Department of Corrections of Illinois,* 434 U.S. 257, 264 (1978)).

Appellant invites us to measure the thirty day period prescribed by Rule 4(a)(1) from the August 12 order of the district court denying his application for a certificate of probable cause. We decline the invitation. Habeas corpus proceedings in our court are governed by Fed. R. App. P. 22. A specific timetable is set forth in Rule 22(b), including the provision that "[i]f an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate shall not issue". Thus, the district court may act on an applicant's application only "if an appeal is taken". An appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4". Fed. R. App. P. 3(a). Although we would not dismiss a timely appeal merely because an application for a certificate was made (or indeed granted) prior to the time that the notice was filed, the more appropriate procedure is for an applicant to take an appeal by filing a timely notice of appeal, seek a certificate of probable cause, and then proceed with the appeal. This is in accordance with rule 22(b) which provides in relevant part that "an appeal by the applicant for the writ *may not proceed* unless a district or a circuit judge issues a certificate of probable cause" (emphasis added). This means only that the appeal may not *proceed* in the absence of a certificate—it does not remove the jurisdictional prerequisite of the filing of a timely notice of appeal in accordance with Rule 4.

We reject appellant's contention, therefore, that it would be premature to file a notice of appeal prior to seek-

ing a certificate of probable cause. *Accord, Clements* v. *Wainwright,* 648 F.2d 979, 980 (5 Cir. 1981) (rejecting proposition that certificate must be sought before or simultaneously with a notice of appeal) (citing *Klier* v. *Wainwright,* 464 F.2d 1245 (5 Cir. 1972), *cert. denied,* 409 U.S. 1129 (1973)).

Appeal Dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - X
DANIEL LATELLA,

Petitioner,

-against-

NORWOOD JACKSON, as Warden, Westchester County Department of Corrections, and THE STATE OF NEW YORK,

Respondents.
- - - - - - - - - - - - - - - - X

85 Civ. 7818 (KTD)
MEMORANDUM & ORDER

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KEVIN THOMAS DUFFY, D.J.:

This action was filed on December 11, 1985 seeking the release of the petitioner on a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Simultaneously, the petitioner moved for release on bail pending determination of his petition claiming that he was seriously ill and in need of hospitalization. Because I determined that neither the petition nor the motion had any merit, I did not accord them the priority usually given such matters, thus delaying written decision until now.

Daniel Latella pleaded guilty to the crimes for which he is now incarcerated. Daniel Latella pleaded guilty apparently because he was guilty. In the allocution at the time of his plea, Latella admitted his guilt. He told the facts that only a

guilty man would know. These facts Latella recited showed that the arresting officer had probable cause to stop him and to arrest him. Yet, that stop and that arrest are the basis for much of the litigation surrounding this case, including this petition.

On May 30, 1982, Daniel Latella (sometimes referred to as "petitioner") was stopped for speeding in the Town of Greenburgh by Officer John Ciminna of the Greenburgh New York Police Department. Upon stopping Latella, the officer noted that he appeared intoxicated and the officer required the petitioner to take an Alco Sensor Test. That test revealed the petitioner was legally drunk and Latella was arrested. The search incident to this arrest disclosed that Latella was carrying a loaded pistol strapped to his ankle. The weapon turned out to have been stolen.

Latella was indicted for criminal possession of stolen property in the second degree and driving a motor vehicle while in an intoxicated condition. Latella attempted to suppress all of the evidence gathered by Officer Ciminna on the basis that originally, the officer had no probable cause to stop him. Latella apparently produced a number of witnesses at a hearing before Judge Ritter in the Westchester County Court. These witnesses testified that the officer and Latella both were in the famous Grotto Restaurant and Bar on the Central Avenue in the Town of Greenburgh. At the hearing, petitioner contended that he was not stopped for speeding, but was stopped in the parking lot of the famous Grotto Restaurant while walking towards his car. The People relied upon the testimony of Officer Ciminna which

was accepted by the County Court in Westchester County.

The day after the decision by the County Court to deny the petitioner's motion to suppress, the petitioner pleaded guilty to the entire indictment. During his plea he was placed under oath and admitted to being intoxicated and to having been in the possession of the weapon in question. The petitioner was sentenced as a second felony offender to serve two indeterminate terms of imprisonment of not less than two and one-half years and not more than five years. A stay of the sentence was granted pending appeal.

Approximately one year later while the appeal was pending, Latella moved in Westchester County Supreme Court to vacate his conviction pursuant to New York's newly

discovered evidence statute N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). The basis of this motion was the alleged discovery of allegedly new evidence consisting of a witness who was a Captain of the Yonkers Police Department and who claimed to have been in the Grotto Restaurant the night of petitioner's arrest. The Police Captain supposedly had surreptitiously followed petitioner out of the premises for the purpose of observing him and did observe him being stopped by the arresting officer before ever having entered his automobile. Judge Rosato granted a hearing on the motion to vacate the conviction and heard the testimony of the Police Captain to the effect that the petitioner had, in fact, been arrested prior to entering his automobile. Judge Rosato for some reason totally ignored the petitioner's own admissions at the time of

his plea of guilty which were directly contrary to the proffered testimony. By ignoring the defendant's own statements, Judge Rosato did not have to deem the defendant's allocution under oath to be perjury and instead was able to find that there was a substantial likelihood that the arresting officer's statements were perjury. The arresting officer's statements were, however, totally consistent with the defendant's admissions on the allocution.

Judge Rosato in this way was able to grant the motion to vacate the conviction and entered an order to that effect. The People appealed.

The two appeals were decided on the same day and the decisions appeared on page six of the New York Law Journal on July 18,

1985. The appeal from the suppression hearing order was decided by Judges Mollon, Mangano, Thompson, and O'Conner. The appeal from Judge Rosato's order was decided by Judges Mollon, Mangano, O'Conner, and Weinstein. In the latter appeal, the Appellate Division reversed Judge Rosato's order both on the facts and on the law. The concluding paragraph of that Memorandum and Order reads:

> The hearing court, on what appears to be its own initiative, characterized defendant's claim as a motion to vacate on the ground that the guilty plea was induced by fraud and perjury (See, People v. Calero, 23 A.D.2d 698). Defendant was given a full and fair opportunity to present evidence to support his position at the suppression hearing. After the denial of the

motion to suppress, defendant elected to plead guilty. Furthermore, during the plea allocution, defendant not only admitted his guilt, but he also acknowledged the facts constituting probable cause for his arrest. We therefore conclude that defendant was not induced to plead guilty by either fraud or perjury, and find unavailing his belated attempt to exculpate himself by use of yet another witness.

28 U.S.C. § 2254 (1982) provides for the release of an individual in state custody only if his confinement is "in violation of the Constitution or laws or treaties of the United States." In making this determination the federal court must defer to the state court's findings of fact as long as they are "fairly supported by the record." 28 U.S.C. § 2254(d). Such

deference is required irrespective of whether the factual determinations were made by a state trial level or appellate court. Sumner v. Mata, 449 U.S. 539, 547 (1981). Latella argues the facts found by the Appellate Division were inaccurate in light of the newly discovered Police Captain evidence. After reviewing the record developed below I am convinced not only that the Appellate Division's findings of fact are fairly supported by the record, but I agree with them entirely.

Latella further asserts that N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) "is unconstitutional to the extent it precludes relief to one who has been the victim of perjured police testimony." The claim is improperly asserted.

28 U.S.C. § 2254(b) requires that a petitioner exhaust his state remedies before pursuing a writ of habeas corpus in federal court. Exhaustion requires that the state court be "given a fair opportunity to pass upon the federal claim." Dave v. Attorney General of the State of New York, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), cert. denied, 464 U.S. 1048 (1984); Picard v. Connor, 404 U.S. 270, 275 (1971).

Because the constitutionality of N.Y. Crim. Proc. Law § 440.10 was never presented or even suggested to any court during the prior proceedings in this case, section 2254(b) prohibits consideration of the issue.

Latella's final claim is that the New York state courts misapplied state law by

sentencing him as a second felony offender pursuant to N.Y. Crim. Proc. Law § 440.10. He claims that under New York law his prior federal conviction for gambling under 18 U.S.C. § 1955 (1982) was impermissibly treated as a felony. Even if this were so, "A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41 (1984) (review of the "proportionality" of sentences is not required by the Eighth Amendment). Moreover, it appears the issue has been waived by petitioner's failure to raise it in prior proceedings.

For all of the above reasons, petitioner's request for a writ of habeas corpus is denied. All other motions are denied as moot.

SO ORDERED.

DATED: New York, New York
May 27, 1986

KEVIN THOMAS DUFFY, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - X
DANIEL LATELLA,

Petitioner,

-against-

NORWOOD JACKSON, as Warden, Westchester County Department of Corrections, et ano.,

Respondents.
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85 CIVIL 7818
KTD

JUDGMENT

Petitioner having filed this action on December 11, 1985, seeking release on a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and simultaneously moving for release on bail pending the determination of his petition, and the said application having come before the Honorable Kevin Thomas Duffy, U.S.D.J., and the Court thereafter on May 29, 1986, having handed down it's memorandum and order denying petitioner's request for a writ of habeas corpus and denying all other motions as moot, it is,

ORDERED, ADJUDGED AND DECREED: That the petition for a writ of habeas corpus be and it is hereby denied.

/s/ Raymond F. Burghardt
Clerk

DATED: NEW YORK, N.Y.
June 4, 1986

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 06-05-86.

ENDORSEMENT

Daniel Latella v. Norwood Jackson and The State of New York 85 Civ. 7818 (KTD)

Nothing in this motion for reargument is new. Somehow petitioner's counsel believes that the words "fundamental fairness" by themselves, raise an issue under the United States Constitution. I do not agree.

The cases cited to the state courts essentially dealt with issues of state law and interpretation of state law. Petitioner relied on Mesarosh v. United States, 352 U.S. 1, 14 (1956), a case involving the exercise of the United States Supreme Court's supervisory jurisdiction over the Federal Courts. This did not, to my mind, fully and fairly raise in the state courts

the issue under the United States Constitution now brought forward by petitioner's counsel.

The motion to reargue is denied.

SO ORDERED.

DATED: New York, New York
June 24, 1986

/s/ Kevin Thomas Duffy
KEVIN THOMAS DUFFY, U.S.D.J.

ENDORSEMENT

- Daniel Latella v. Norwood Jackson, et al.
85 Civ. 7818 (KTD)

Petitioner, Daniel Latella, having been denied habeas corpus relief and reargument, now moves for a certificate of probable cause pursuant to 28 U.S.C. § 2253 (1982). Before the certificate may be granted "the district court must find that the petition is not frivolous and that it presents some question deserving appellate review." Alexander v. Harris, 595 F.2d 87, 91 (2d Cir. 1979).

In my Memorandum & Order of May 27, 1986 and Endorsement of June 24, 1986, I held that the petitioner had failed to present any issue of constitutional magnitude for resolution in the state courts, and thus, had failed to exhaust his state remedies. Under such circumstances

the motion for a certificate of probable cause is denied.

SO ORDERED.

DATED: New York, New York
August 8, 1986

/s/ Kevin Thomas Duffy
KEVIN THOMAS DUFFY, U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of August one thousand nine hundred and eighty-seven.

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DANIEL LATELLA,

Plaintiff-Appellant,

v.

NORWOOD JACKSON, as Warden, Westchester County, Department of Corrections, and THE STATE OF NEW YORK,

Docket No. 86-2308

Defendants-Appellees.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellamt Daniel Latella, pro-se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - X
DANIEL LATELLA,

Petitioner,

-against-

WILLIAM KIRK, as Superintendent, Wallkill Correctional Facility, Department of Correctional Services, and THE STATE OF NEW YORK,

Respondents.
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85 Civ. 7818 (KTD)
NOTICE OF APPEAL

Notice is hereby given that DANIEL LATELLA appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on August 12, 1986, denying petitioner DANIEL LATELLA'S motion made pursuant to Title 28, United States Code, Section 2253 (1982) for a certificate of probable cause, following the denial of habeas corpus relief by Order dated May 27, 1986 and reargument by Order dated July 24, 1986.

Dated: New York, New York
September 3, 1986

Respectfully submitted,

/s/ Francis J. Murray
Francis J. Murray, Esq.
Murray & Skoff
Attorneys for Petitioner
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